IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-627

McDONNELL DOUGLAS CORPORATION,
Petitioner,

v.

HAZEL TUFT, Individually, and Hazel Tuft as a Member of a Class of Female Employees of McDonnell Douglas Corporation,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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OPINIONS BELOW

The opinion of the district court is reported at 385 F.Supp. 184. The opinion of the Court of Appeals reversing the district court is reported at 517 F.2d 1301.

JURISDICTION

The opinion of the Court of Appeals was filed on May 27, 1975. Petitioner filed a petition for rehearing and rehearing en

banc which was denied on July 2, 1975. On September 29, 1975, petitioner filed in the Court of Appeals a Motion for Leave to file an out-of-time petition for rehearing en banc. This was denied on October 9, 1975.

On September 26, 1975, Mr. Justice Blackmun entered an Order extending the time for filing the petition for certiorari until October 30, 1975. On November 3, 1975, Mr. Justice Blackmun entered an Order extending the time for filing a brief in opposition to the petition for certiorari to December 11, 1975.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Are the questions raised by petitioner of no precedential value since EEOC changed its procedures on March 4, 1975, eliminating the two-letter system?

2. When the charging party filed her suit within 90 days after she received a Notice of Right to Sue from the EEOC, was this timely filed?

3. Can a charging party's claim be barred when she instituted suit within the period recommended by EEOC, the administrative body which had been established to help vindicate rights under 42 U.S.C. 2000e *et seq.*?

4. Is the right to sue letter to the charging party properly issued after both a failure of conciliation and a decision by the EEOC that it will not bring a civil action?

STATUTES INVOLVED

42 U.S.C. § 2000e-5(f), provides as follows:

> "If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission,

> or if within one hundred and eighty days from the filing of such charge . . . the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge . . ."

STATEMENT OF THE CASE

On August 13, 1971, respondent, Hazel Tuft, filed a sex discrimination charge against petitioner. On December 15, 1972, the EEOC made a reasonable cause determination of discrimination against petitioner. Thereafter, conciliation efforts were commenced, and on February 13, 1974, a letter was sent to respondent advising her that conciliation efforts had failed, and further advising her that she could request a letter of Right to Sue. The letter further advised her that she had only 90 days to get a lawyer to file suit after request of the right to sue letter, and it is not wise to request the Right to Sue letter until she had obtained a lawyer who has agreed to represent her.

After obtaining a lawyer, respondent requested the Right to Sue letter which was sent to her on June 14, 1974. This second letter advised her that she could institute a civil action within 90 days of receipt of the letter.

The action was filed on June 20, 1974, within 90 days of receipt of the second letter.

The District Court sustained petitioner's Motion to Dismiss holding that the 90 days ran from the receipt of the first letter, and that respondent was barred from bringing her action.

The Court of Appeals reversed, holding that the 90 days ran from the receipt of the second letter, and, therefore, the suit was timely filed.

Petitioner filed for rehearing en banc and this was denied, and later filed for leave to file an out-of-time petition for rehearing en banc in view of the fact that three cases[1] involving the same issue were to be argued en banc by the Court of Appeals. This request was denied.

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[1] *Harris v. Sherwood Medical Industries, Inc.*, 386 F.Supp. 1149 (8th Cir., No. 74-1981); *Whitfield v. Certain-Teed Products*, 389 F.Supp. 274 (8th Cir., No. 75-1077); and *Lacy v. Chrysler Corporation*, — F.Supp. — (8th Cir., No. 74-1949).

REASONS FOR DENYING THE WRIT

I

In cases in which the EEOC has decided not to institute an action it has now eliminated its two-letter system, and now sends out one letter incorporating three items of importance to the charging party: that compliance has failed, that it does not intend to file a civil action and that charging party has 90 days to file a civil action. See CCH LLR, Employment Practices, ¶ 5318.

The Court in *Roberts v. H.W. Ivey Construction Co.*, — F. Supp. —, 11 F.E.P. Cases 697 (N.D. Ga. 1975) stated on p. 698:

> The Court notes that the EEOC has abandoned its practice of sending two letters to complainants regarding failure of conciliation efforts and right to sue. CCH LLR, Employment Practices, ¶ 5318. *Thus the confusion regarding satisfaction of the 90-day requirement will be confined to a limited number of complainants.* (Emphasis supplied.)

Thus, it is obvious that there is no precedential value or public importance to a Supreme Court decision on the two-letter system by reason of the abandonment of the procedures on March 4, 1975.[2]

II

There is no conflict in the Circuits with respect to the result reached in the Eighth Circuit opinion.

There are basically three cases in the Circuits dealing with the issue, they are all in agreement, and they are *Tuft, DeMatteis v. Eastman Kodak Company*, 511 F.2d 306, *judgment modi-*

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[2] See Appendix A for the new Notice of Right to Sue.

fied on rehearing 520 F.2d 409 (2nd Cir. 1975), and *Gates v. Georgia Pacific*, 492 F.2d 292 (9th Cir. 1974).

Tuft holds that the first letter issued to respondent explicitly told her that the 90 days would not run until receipt of the second letter. The Eighth Circuit held that the critical phases in § 706(f) are "so notify" and that "the aggrieved person must receive actual and effective notification of his right to sue."

This Court in *McDonnell Douglas v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973) and *Alexander v. Gardner-Denver*, 415 U.S. 36, 47, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974) held there then were two prerequisites for the institution of an action:

1. Filing timely charge of employment discrimination.
2. Receiving and acting upon the Commission's Statutory Notice of Right to Sue.

The only letter that clearly notified respondent when suit was to be filed was the second letter, and she filed her suit within this 90-day period.

Petitioner raises the question of EEOC postponement of the commencement of the 90-day filing period and manipulation of the act so that the charging party has unfettered control over the running of the limitations period.

Congress has not limited the period of EEOC investigation and conciliation.

In *Johnson v. Railway Express Agency, Inc.*, — U.S. —, 44 L.Ed.2d 295, 299 (1975) this Court noted the length of time that it took EEOC to investigate, decide and issue its Right to Sue letter.

Petitioner's argument that respondent controls the statute of limitations is specious.[3] This Court is not faced with a ten-year

[3] Congress, in extending the 30-day period for suit to 90 days, was well aware that the claimant might have some trouble in filing a suit in thirty days since counsel had to be obtained, and that counsel had to obtain the facts necessary for the institution of an action.

delay in the request for the "Notice of Right to Sue" as hypothesized by Petitioner. If one counts 90 days from February 13, 1974, the date that conciliation allegedly had failed, then that period expired on or about May 12, 1974. Suit was actually filed on June 20, 1974, about 38 days later. The hypothetical possibilities raised by Petitioner have no reality to the facts this Court must face.

This Court further in *Love v. Pullman Co.*, 404 U.S. 522, 527, 92 S.Ct. 616, 30 L.Ed.2d 679 (1972) gave a flexible interpretation to related timely provisions[4] and stated:

> Such technicalities are particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process.

III

The Eighth Circuit in *Tuft* held that respondent had relied on the Commission's procedures and in the absence of prejudice to petitioner she should not be penalized for errors of the EEOC.

Although petitioner cites *DeMatteis v. Eastman Kodak Company, supra*, it misconstrues the modified opinion for it totally adopts the *Tuft* position of prejudice and states in the modified opinion on p. 411:[5]

> It would be inequitable under such circumstances, and would frustrate the remedial purpose of the Civil Rights Act, to apply the decision of this court so as to bar the claim of a party who filed suit within the period recommended by the administrative body which had been established to help vindicate such statutory rights.

[4] See *Reeb v. Economic Opportunity Atlanta, Inc.*, 516 F.2d 924 (5th Cir. 1975).

[5] The Second Circuit made its original decision prospective.

In *Guerra v. Manchester Terminal Corp.*, 498 F.2d 641, 649 n. 12 (5th Cir. 1974), the Court states clearly that a relying claimant should not be barred from bringing a law suit:

> To the argument that the opposite result might encourage the EEOC to give closer attention to the congressionally mandated time limit for filing complaints, we reply only that punishment of the individual, private grievant seems an unsatisfactory carrot for encouraging the EEOC to put its administrative house in order. If any house cleaning is necessary, sticks applied directly to the EEOC would prove more efficacious, and more just.

IV

42 U.S.C. § 2000e-5(f) provides that after failure of conciliation and *after the Commission has decided not to file a civil action* then EEOC shall notify the person aggrieved of the right to sue.

In this case, the first letter merely said that there was failure of conciliation, there was no mention made of the decision by the EEOC on its decision for suit. Therefore, the 90 days could not run from the date of the first letter. EEOC, after argument, submitted to the Eighth Circuit its control ledger on respondent, Appendix B, which reflects that on February 22, 1974, or 9 days after the letter of failure of conciliation had been written, the matter had been sent to litigation, which clearly reflects that the matter was still being considered for litigation by the EEOC.[6] Since EEOC was still considering litigation, the letter reflecting failure of conciliation could not trigger the limitation period.

[6] EEOC is not bound to file an action within 180 days after the filing of a charge. See *EEOC v. Kimberly-Clark*, 511 F.2d 1352 (6th Cir. 1975); *EEOC v. Louisville & Nashville R. Co.*, 505 F.2d 610 (5th Cir. 1974); *EEOC v. Cleveland Mills Co.*, 502 F.2d 153 (4th Cir. 1974); *EEOC v. Meyer Brothers Drug Co.*, 521 F.2d 1364 (8th Cir. 1975).

V

The District Court cases cited by petitioner are basically all decisions that have relied on the decisions of the District Judges of the Eastern District of Missouri.

There are other District Court cases that support respondent here. *Roberts v. H. W. Ivey Construction Co., supra; Taylor v. Pacific Intermountain Express Co.*, 394 F.Supp. 72 (N.D. Ill. 1975); *Doman v. SKF Industries, Inc.*, — F.Supp. —, 11 F.E.P. Cases 359 (E.D. Pa. 1975); *Smith v. General Dynamics Corporation*, — F.Supp. —, 10 F.E.P. Cases 1398 (S.D. Calif. 1975); *Robinson v. Refrigerated Foods, Inc.*, — F.Supp. —, 10 F.E.P. Cases 1237 (D.Col. 1975); *Garneau v. Raytheon Company*, 323 F.Supp. 391 (D.Mass. 1971); *Pullen v. Otis Elevator Co.*, 292 F.Supp. 715 (N.D. Ga. 1968).

CONCLUSION

For the reasons stated the Petition for a Writ of Certiorari should be denied.

Respectfully submitted

LOUIS GILDEN
722 Chestnut Street
Suite 1501
St. Louis, Missouri 63101
Attorney for Respondent

APPENDIX

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

CONCILIATION FAILURE
NOTICE OF RIGHT TO SUE — APPENDIX A

TO:	FROM:	
EEOC REPRESENTATIVE	CASE CHARGE NUMBER	TELEPHONE NUMBER

The Commission has found reasonable cause to believe your charge of employment discrimination is true but has not entered into a conciliation agreement to which you would have been a party because attempts to achieve such a voluntary settlement with the respondent(s) have been unsuccessful.

The Commission has determined that it will not bring a civil action against the respondent(s) and accordingly is issuing you this Notice of Right to Sue. The issuance of this Notice terminates the Commission's processing of your charge, except that the Commission may seek status as intervenor if you decide to sue on your own behalf as described below.

If you want to pursue your charge further, you have the right to sue the respondent named in this case in the United States District Court for the area where you live. IF YOU DECIDE TO SUE, YOU MUST DO SO WITHIN NINETY (90) DAYS FROM THE RECEIPT OF THIS NOTICE; OTHERWISE YOUR RIGHT IS LOST.

If you do not have a lawyer or are unable to obtain the services of a lawyer take this Notice to the United States District Court which may, in its discretion, appoint a lawyer to represent you.

You have a right to inspect and copy information contained in the Commission's case file for use in a public court proceeding if you decide to sue. If you want to inspect this material, need help in filing your case in court or have any questions about your legal rights contact the EEOC representative named above.

An information copy of this Notice has been sent to the respondent(s) named in your case.

_____ Date

_____ District Director

cc:

EEOC [illegible] 161A

Exhibit 66-D
66-6

APPENDIX B

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
CASE CONTROL LEDGER

1. LEAD CHARGING PARTY	2. NO. OF CHARGES	3. FILING DATE	4. BASIS	5. ISSUE	6. CASE NO
Tuft, Hazel	1	11-1-71	F	L3K	YSL3-203

7. RESPONDENT NO. (NAME, ADDRESS & ZIP CODE)
McDonnell Douglas Corp.
P. O. Box 516
St. Louis, Missouri 63166

12.

8. PCA	9. SIC	10.	11. NO. RESP.	13. TYPE	14. I.D. NO.	15.
	3721		1	E		

16. RESPONDENT NO. (NAME, ADDRESS & ZIP CODE)

17. ADDITIONAL RESPONDENTS, ETC.
Schuetz

18. INVESTIGATOR

19.	19. TYPE	19. I.D. NO.	20.
TSL2-0037			

21. ← LEAD C.P. CHARGE NUMBER

				5	

24. DATE	25. ACTION CODE	EXPLANATION	26.	28.	27. INITIALS
		Sent to Chicago Litigation Per Charla Charla's memo 5-21-73			
		Returned assigned to Lorenz			
2-13-79	093	Unsuccessful Concil.			
2-22-79	068	Sent to Litigation			PW
6/14/74	089	RIGHT TO SUE ISSUED			SJS
		File Returned per GDH Request 7-25-79			
		file sent to Juan Rivera 12-12-79 Per GDH			